BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CATHERINE MARY HOLUB, DECEASED	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,052,048
KVC HEALTH SYSTEMS, INC.	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and Claimant requested review of the May 2, 2012 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on September 5, 2012.

APPEARANCES

Daniel L. Doyle, of Overland Park, Kansas, appeared for the claimant. Stephanie Warmund, of Overland Park, Kansas, appeared for respondent and its insurance carrier. Jeffrey King, of Salina, Kansas, has been appointed as a Board Member Pro Tem in this case in place of former Board Member David Shufelt.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ determined that driving was an intrinsic part of claimant's job and the necessity of being on the road extensively exposed claimant to additional risks associated with her employment. Therefore, he found claimant's accidental death arose out of and

in the course of her employment with respondent and awarded her family (husband and three children) death benefits.

Respondent appealed arguing that the accident is not compensable for two reasons. First, the accident which led to claimant's death was caused by her falling asleep while driving which was a personal risk to claimant, with no relationship to her employment. Second, claimant was not in the course of and scope of her employment at the time of the accident because she was on her way home after work. Therefore, under K.S.A. 44-508(f) claimant would be ineligible for workers compensation benefits.

Claimant appealed, contending the ALJ erred in not including $79.33 in fringe benefits with the average weekly wage. However, claimant's position relies on information attached to her brief to the Board, which includes a May 8, 2012 telephone hearing transcript and its exhibits. This hearing was held six days after the Award was issued. Respondent contends that the arguments in claimant's brief and the attachments to claimant's brief cannot be considered, as the transcript and its exhibits are not a part of the record considered for the purposes of the Award. Respondent objects to the consideration of the transcript and exhibits as the Award had already been issued and the appeal to the Board already filed at the time of the telephone hearing.

The issues of the parties are as follows:

Respondent

1. Did the accident arise out of and in the course of claimant's employment, or was the accident the result of a personal risk of claimant's and/or occurred while claimant was returning home from work in violation of the coming and going rule of K.S.A. 44-508(f)?

Claimant

1. Should claimant's stipulated benefits package which amounted to $79.33, which was inadvertently excluded from the record, be included in the average weekly wage?

2. Should interest be awarded pursuant to K.S.A. 44-512b because respondent and its insurance carrier, did not establish or even allege a colorable defense to this claim based on established case law?

3. Should it be ordered that the medical expenses be paid directly to Kenneth Holub in his individual capacity and as a conservator of the minor children, instead of to the health care providers?

4. Did the ALJ err in excluding from consideration the Telephone Conference Transcript of Proceedings on May 8, 2012, with the attached exhibits and in denying claimant's request for a Nunc Pro Tunc to correct the average weekly wage?

FINDINGS OF FACT

Claimant worked for respondent as a recruiter obtaining foster parents for children. She also taught foster parenting classes in the evenings. Claimant's job required that she travel throughout 30 counties in Northern Kansas. Her supervisor, Jessica Freeman, was located at respondent's office in Salina, Kansas. Claimant lived in Tampa, Kansas. Claimant was paid mileage from her home to her various destinations and back home.[1] Claimant's husband, Kenneth Holub testified that claimant was authorized to work out of their home and she had an office in the back of their house.

Debra Palmer, a former administrative assistant for respondent, testified that she used to work five days a week, and that claimant would come into the office in Salina from Tampa, Kansas three to five days a week. Ms. Palmer testified that the days claimant was not in the office, she was out recruiting in the area. Ms. Palmer testified that on March 26, 2010, the day of the accident, claimant had called in stating that she was leaving her house and would arrive after she made a couple of recruiting stops. Ms. Palmer testified that claimant made it into the office around 11:30 a.m. and the two went to lunch. They returned to the office after lunch and then both left again to continue recruiting. Ms. Palmer drove as her vehicle was bigger and they had supplies to pick up. They returned to the office just before 3 p.m.

Ms. Palmer testified that there was also a farm expo in Salina that week and claimant had a booth at the expo. At the end of the expo, the booth was torn down and everything was loaded into claimant's car. Claimant kept her recruiting materials in the back of her car so she would always have them with her.

Ms. Palmer testified that she had known claimant since May 7, 2007, and she didn't notice anything unusual about her on March 26th. She testified that they talked about claimant going to get items to fill Easter baskets for her kids. After they arrived back at the office around 3:00 p.m., they loaded claimant's car with the supplies and claimant left to go to the dry cleaners in Marion, Kansas. That was the last time Ms. Palmer saw the claimant.

On March 26, 2010, claimant drove from Salina to Marion, Kansas where she dropped off a tablecloth to be cleaned. The tablecloth was used during her job related presentations and needed to be cleaned for a co-worker the next week. On her way home from Marion, claimant was in an automobile accident. She died as a result of her injuries on March 28, 2010. Claimant was survived by her husband, Kenneth and three adopted children, Steven, Amber and Rosalie.

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[1] R.H. Trans. at 13.

Mr. Holub testified that on the day of the accident, found in claimant's car, were the work materials she usually carried. He testified that claimant was constantly working trying to find foster parents for her kids, but he never actually witnessed her performing any of her job duties. Mr. Holub testified that he was not quite sure of claimant's exact work schedule from day to day. He testified that claimant did work at home on the weekends and used the family computer. He could not estimate how many hours she worked.

Mr. Holub testified that claimant loved her job and only took off when she had leave time to use or lose. He doesn't know what caused the accident. Claimant never complained about being tired the week of her accident. He testified they had been on vacation visiting family the week before.

At the time of her death, claimant was 5 foot 4 inches tall and weighed 265 pounds. Claimant was diagnosed with sleep apnea in early 2001 and was prescribed a sleep machine to use at night. Mr. Holub testified that from January to March 2010, claimant was not using the machine very much.[2] He testified he "couldn't tell" if claimant had used the sleep machine much in 2008 or 2009.[3] He testified that he didn't know what effect the machine had on claimant when she did not use the sleep machine. He was also not aware that claimant was taking Celexa and Ativan at the time of her death.

Mr. Holub learned of the accident from a friend and went directly to the scene of the accident when he heard the news. The accident scene is eight miles from their home and claimant had traveled the road in question many times. When he got to the scene, claimant was conscious and talking. She told him that she thought she had fallen asleep at the wheel.[4]

David Huntley, undersheriff for Marion County, has been in law enforcement for 29 years and at the time of the accident, undersheriff for three years. Undersheriff Huntley testified that it was his understanding that claimant had a one-car accident on Remington Road, north of Marion. Undersheriff Huntley described the road claimant was on as paved. Undersheriff Huntley acknowledged that the claimant had to have been coming from Marion, Kansas because that is the only reason she would have been on Remington Road going north. The accident occurred on a public thoroughfare during the day. There was no intersection where the accident occurred and there were no adverse road or weather conditions.

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[2] R.H. Trans. at 27.

[3] R.H. Trans. at 27.

[4] R.H. Trans. at 30-31.

Undersheriff Huntley testified that the police report indicated that claimant had sleep apnea and the report indicated that claimant stated that she thought that she fell asleep at the wheel.

Renee Lincoln, a director of child placing in Region 3 for respondent, has worked for respondent since March of 1998. Ms. Lincoln had been claimant's supervisor for the last three years of claimant's employment. Ms. Lincoln works out of the Topeka office, but also supervises the Salina and Junction City offices. She testified that the Salina office used to have a local supervisor while claimant was working there and her name was Jessica Freeman. Ms. Freeman no longer works for respondent as her employment was terminated and Ms. Lincoln absorbed that office and the supervisor duties.

Ms. Lincoln testified that Ms. Freeman had the authority to approve claimant's mileage reimbursement requests and would send the information to accounting for processing. Ms. Lincoln is not aware if Ms. Freeman ever denied any of claimant's mileage reimbursement requests.

Ms. Lincoln testified that on the day of claimant's accident, she believes claimant was engaged in recruiting activities. Claimant's reimbursement paperwork shows she traveled from 1,500 to 2,000 miles a month for respondent.

Ms. Lincoln confirmed that claimant had an office in her home in Tampa, Kansas. She testified that claimant had computer access to the company's system and a company cell phone to conduct business. The computer was identified as a personal computer belonging to claimant. Claimant also had office space at the Salina office. Claimant was allowed to make her own work schedule, but was also given specific assignments that needed to be taken care of.

Ms. Lincoln testified that claimant tried to do most of her work in Salina, Junction City and Topeka, but her area of responsibility included 30 counties. Claimant was the only recruiter for her region. Ms. Lincoln testified that during the week of claimant's accident claimant had been assigned to run a booth at the farm expo for several days. Ms. Lincoln did not know what else claimant had going on that week. Ms. Lincoln testified that the claimant told her she was taking the company tablecloth, which she used for work related events, to the dry cleaners in Marion, Kansas because they were cheaper.[5] Ms. Lincoln testified that she didn't care to micro-manage her people as long as their goals were met, so she was fine with claimant taking the tablecloth where she felt was best. The tablecloth cleaned was to be delivered it to Stacey Manbeck on March 29th for her to use.

Ms. Lincoln testified that claimant was allowed to adjust her schedule as she needed to avoid working over 40 hours, as the company does not pay any overtime. Claimant did

[5] Lincoln Depo. at 17-18.

work a lot of weekends, as that is when the company held a lot of its events. Ms. Lincoln described claimant as very effective, upbeat and very cheerful, and an all around excellent employee.

Jessica Freeman testified that when she worked for respondent she was claimant's indirect supervisor and supervisor of respondent's Salina office. Ms. Freeman and claimant worked together for about five years. Ms. Freeman testified she was in the office three to four days a week and on the other day or days she was in Junction City and Manhattan attending meetings with the rest of her staff or in Topeka for a meeting.

Ms. Freeman testified that claimant went from her house in Tampa, Kansas to the Salina office on an average of three days a week, depending on the events. On the other days, claimant would be out recruiting in the community, or working at home making phone calls to prospective foster parents. According to Ms. Freeman, claimant worked at home for two and a half years with the approval of Renee Lincoln.[6]

Ms. Freeman testified that she was authorized by Renee Lincoln to approve claimant's mileage reimbursement requests because she worked directly with claimant and was able to observe her travel and work activities. Ms. Freeman testified that claimant never came straight to the office or went straight home because she was always stopping off at various businesses, churches and other places to hand out recruitment material. That is why claimant always put mileage for recruitment on her reimbursement forms. Claimant was constantly working to recruit new people.[7] Claimant was paid for travel to and from the office and recruiting events to her home since she also worked from home.

Ms. Freeman testified that she was not working on the day of claimant's accident, but that, based on her experience with the claimant, if claimant had been working on recruiting that day, she would have been paid mileage from the time she left her home until she returned to her home in Tampa. Ms. Freeman acknowledged that driving was an essential element of claimant's job and that claimant could not have performed her job without a car. Ms. Freeman was sure that claimant worked more than the required 40 hours a week, but she couldn't give an exact figure of how much claimant actually worked. Ms. Freeman testified that the claimant made herself available 24 hours a day to anyone who came into contact with one of her recruiting pamphlets.

Ms. Freeman agreed that claimant was a dedicated employee with a husband and three adopted children. She also testified that the claimant had been stressed because her daughter, Amber had been diagnosed with reactive detachment disorder and had been having a hard time. Claimant's daughter had been hospitalized for a while after almost

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[6] Freeman Depo. at 9-10.

[7] Freeman Depo. at 16-17.

burning down the family home. The daughter also pushed her sister off a roof. Ms. Franklin testified that claimant had talked with her and Renee Lincoln about how it would look for her employment with the agency if she and her husband put her daughter back in foster care. It also appeared that, due to past events and other allegations, SRS was investing the welfare of claimant's other two adopted children.

Stacey Manbeck, director of the child placing agency for respondent, testified that claimant's title was a community resource specialist (CRS). Claimant was tasked with recruiting foster homes for the children. Ms. Manbeck testified that part of claimant's job was to hand out written materials to encourage people to become foster parents. She agreed that those who recruit use their personal vehicles to carry the materials to the locations and at the end of the day may bring whatever they have left back to the office. She identified MAPP (Model Approach Partnership and Parenting) classes as being the teaching responsibility of certain agency employees. She acknowledged that those who taught MAPP classes were paid by the agency when the class was complete and the materials turned in.

Ms. Manbeck testified that claimant could not have been paid for her trip from the cleaners to her house because her work ended after she dropped off the tablecloth, as that was her office and respondent does not pay to and from work.[8] Ms. Manbeck had never reviewed any of claimant's mileage reimbursement forms. She was not claimant's supervisor and was not aware if claimant had ever been paid mileage from her home to Salina and back. As for the working hours of the CRSs, Ms. Manbeck testified they adjust their schedules based on the duties they set for themselves.

Ms. Manbeck testified that the blue tablecloth that claimant had laundered on the day of the accident was supposed to come to her on that Monday, the 29th, the day after claimant died. Ms. Manbeck admitted that claimant was not a co-worker of hers and that she only saw claimant maybe once a year. She had been provided no details about claimant's accident.

Donna Rosiere, co-owner of Marion Dry Cleaning and Laundry, testified that she knew claimant as a customer who on occasion would bring in a large blue table cover to be cleaned. Claimant would return three to four working days later to pick up the table cover. Ms. Rosiere testified that it would not be possible for claimant to have the cleaning done in one day because of the size of the cover and because of the special lettering on it.

Ms. Rosiere testified that she remembers claimant bringing in the cover on March 26th probably between 12:00 p.m. and 3:00 p.m. as Ms. Rosiere was by herself because her husband was out delivering clothes in Hillsboro and their business ledger

[8] Manbeck Depo. at 13.

shows that a tablecloth was dropped off for cleaning on that day. She also testified that because it was a Friday she figured that she had until Wednesday before claimant came back for the cover.

Claimant and her husband, Kenneth, were married on March 3, 1984. Mr. Holub works for the Kansas Department of Transportation, Monday through Friday, 7:30 a.m. to 4:00 p.m. He also has a small farming operation.

Mr. Holub was responsible for getting the kids up, fed and dressed for school and then claimant would get up and get the kids on the bus and then she would head for work. He testified that claimant's work hours fluctuated from day to day and sometimes claimant worked from home. Mr. Holub is not aware of the details of claimant's work.

Mr. Holub was not totally aware of claimant's health issues, but he did agree that she had sleep apnea. He testified that claimant had a sleep machine that she used when she was first diagnosed with sleep apnea, but over time claimant stopped using the machine.

Before the accident, claimant had been on a trip to Springfield, Missouri to visit family. Claimant did all of the driving during that trip since her husband did not go. Claimant was traveling with her three kids and her mother.

On the day of the accident, Mr. Holub learned of claimant's accident from his friend Russ Kerbs, who heard from his daughter Ashton Smith. Mr. Holub had just left work and was headed to the bait shop to buy some turkey permits. Mr. Holub went to the accident scene and was able to speak with the claimant. She told him she thought she might have fallen asleep.

Claimant's accident took place on a stretch of two-way highway that she had traveled many times before. At the time Mr. Holub talked with claimant it didn't appear that claimant was seriously injured, but she was transported to the hospital in Wichita, via helicopter.

Dr. Don Hodson, a family physician in Marion, Kansas, testified that along with his family practice he has been the coroner for Marion County for the last 20 years. Dr. Hodson opined that claimant died from complications of the original accident. He testified that claimant had developed aspiration pneumonia immediately maybe even during transport to the hospital and aspirated on her own blood or emesis. Claimant had a bump on her head, a sore shoulder, and a sore place on one of her flanks from the accident. Dr. Hodson opined that there was never an explanation as to why she was spitting and coughing up blood when she was initially found, but the short time before her death was used to try to remedy the aspiration. No autopsy was performed on claimant and Dr. Hodson never saw claimant's body. Dr. Hodson opined that from review of claimant's

medical records she had long history or depression and over the last few years of her life complained of chronic fatigue.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

K.S.A. 2009 Supp. 44-508(f) states in part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume

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[9] K.S.A. 44-501 and K.S.A. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 44-501(a).

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

Respondent contends, for more than one reason, that claimant's accident did not arise out of and in the course of her employment with respondent. First, respondent contends that respondent is not liable for this accident because of the "going and coming" rule contained in K.S.A. 44-508(f). The rationale for the "going and coming" rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[13]

However, there are recognized exceptions to this rule. The appellate courts in Kansas have historically recognized a major exception to the going and coming rule where the going and coming of an employee is "actually contemplated by the employment itself".[14]

One exception has been referred to as the "work-related errand" or "special purpose trip" exception because the court has held that injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is required in order to complete some special work-relate errand or special purpose trip in the scope of the employment.[15]

Another exception to the going and coming rule was articulated in *Messenger*, where an oil field employee was killed in a truck accident on the way home from a distant drill site.[16] The court explained: "One very basic exception to the "going and coming" rule applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels, the employee was furthering the interests of his employer."

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[13] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[14] *Blair v .Shaw*, 171 Kan. 524, 233 P.2d 731 (1950) (where the entire trip by mechanics for an annual certification test was integral to the employment, causing the deaths during the trip to be compensable).

[15] *Mendoza v. DCS Sanitation,* 37 Kan. App. 2d 346, 152 P.3d 1270 (2007); *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan. App. 2d 720, 124 P.3d 87 (2005) rev. denied 281 Kan. 1378 (2006) (injury to a worker driving home in order to pick up keys so he could let his coworkers into a worksite, found compensable); *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997) (injury sustained in a parking lot after claimant attended a continuing education seminar).

[16] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, Syl. 2, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

The law has further evolved where travel is an integral part of the employment. The Kansas Court of Appeals, in *Halford*[17], in a detailed analysis of the "going and coming" rule determined that where daily travel was so contemplated and expected by the claimant's employment, it became incidental to the employment. Justice Leben, in a concurring opinion, went on to state that "where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee . . . has already begun the essential tasks of the job . . . and "is covered by the Workers Compensation Act and not excluded from coverage by the "going and coming rule".[18]

Claimant's employment duties required that she have a vehicle and she traveled extensively for work. It is clear from this record that claimant's travels furthered the interests of her employer. The Board finds that the "going and coming" rule does not apply to this case as travel was clearly an integral part of claimant's job with respondent.

Additionally, on the date of the accident, claimant didn't travel directly from her home to the office in Salina and back to her home, which might act to involve the "going and coming" rule in this case. Instead, she traveled a circuitous route to the office, with recruiting stops on the way. Also, after leaving the Salina office, instead of driving home, she proceeded to Marion, Kansas where she left an office tablecloth for cleaning. This trip to the cleaners involved a "work-related errand", or was a "special purpose trip" for the benefit of respondent. As such, the "going and coming" rule would not preclude an award. The Board finds that claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent.

Respondent further contends that claimant's accident was the result of a personal risk, i.e. claimant's previously diagnosed sleep apnea. Claimant told several people that she may have fallen asleep while driving. The Kansas Court of Appeals addressed this issue in *Bennett*.[19] The claimant in *Bennett* was driving a company vehicle, making a delivery when he suffered an epileptic seizure. The claimant in *Bennett* blacked out and the vehicle hit a tree. The *Bennett* Court recognized the generally accepted rule that where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting idiopathic

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[17] *Halford v Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008).

[18] *Id.* at 942.

[19] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

condition and some hazard of employment, compensation is generally allowed.[20] The *Bennett* Court held that if *Bennett* had a seizure and lost consciousness, the fact he was driving the employer's vehicle in the course of his employment subjected him to the additional risk of travel. "While the seizure was personal to claimant, the risk of travel arose out of the employment and the two occurred to produce the injuries."[21]

In this instance, even if claimant did succumb to the effects of sleep apnea, the combination of the sleep apnea and the additional risk of travel would cause this accident to be work-related and thus, compensable.

K.S.A. 2000 Furse 44-512b states:

> (a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.
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> (b) Interest assessed pursuant to this section shall be considered a penalty and shall not be considered a loss or a loss adjustment expense by an insurance carrier in the promulgation of rates for workers compensation insurance.
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> (c) This section shall be part of and supplemental to the workers compensation act.

Claimant contends she is entitled to pre-judgment interest due to respondent's failure to pay prior to the award. However, as noted above, respondent's contentions that this matter is not compensable are not frivolous. There were legitimate issues dealing with the "going and coming" rule and the possible exceptions to that rule. The Board cannot find that respondent and its insurance carrier's failure to pay prior to this award was without just cause or excuse. The request for interest pursuant to K.S.A. 2000 Furse 44-512b is denied.

Claimant requests the payment of medical bills, some of which were paid by claimant's personal insurance, be made directly to Kenneth Holub individually and in his capacity as conservator of the minor children. Claimant cites no case or statutory law in support of this unusual payment request. The Board has found no authority which allows

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[20] *Southland Corp. v. Parson*, 1 Va. App. 281, 285-86, 338 S.E.2d 162 (1985).

[21] *Bennett,* 16 Kan. App. 2d 460.

the payment of medical expenses directly to the claimant, unless claimant is seeking reimbursement for already paid expenses, which is not the case here. The ALJ ordered all medically related expenses to be paid pursuant to the Kansas Fee Schedule. Those payments would be directly to the health care providers, except where claimant has paid medically related expenses and is seeking reimbursement for same. The Award of the ALJ is affirmed on this issue.

The Board will next address the issue of claimant's average weekly wage. The ALJ determined the base wage to be $532.37, pursuant to the agreement of the parties. In dispute were certain payments made to claimant for PS-MAPP classes conducted by claimant wherein she was paid $1,038.91 for teaching the classes. This calculated to a weekly benefit of $79.92, which the ALJ correctly added to the average weekly wage. However, an additional amount of $79.33 was requested by claimant, which amount represented the additional compensation claimant was provided by respondent during her employment.

K.S.A. 2009 Supp. 44-511(a)(2)(3) states:

> (2) The term ''additional compensation'' shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.
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> (3) The term ''wage'' shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

The disputed amount of additional compensation was discussed at the pre-hearing settlement conference conducted by the ALJ, with both parties present. That fact is supported by the notes of the ALJ from that conference which are a part of the division's file in this matter. Claimant argues it was also the subject of correspondence between counsel for both claimant and respondent. Even though it was memorialized in his pre-hearing settlement conference notes, the ALJ omitted this amount from the average weekly wage calculation in the Award, presumably because the issue was not raised at the regular hearing. After the issuance of the Award, claimant requested that the ALJ issue an Order Nunc Pro Tunc in order to correct the wage omission of the additional compensation amount. Respondent objected, arguing that the ALJ lacked the jurisdiction to amend the Award after the Award had been issued.

K.S.A. 2000 Furse 44-526 states:

> Any award of compensation may be modified by subsequent written agreement of the parties, but no such agreement modifying an award shall be valid as against the workman unless such agreement or a copy thereof be filed by the employer in the office of the director within sixty (60) days after the execution of such agreement.

The ALJ would have the authority to amend the Award by subsequent written agreement of the parties under K.S.A. 2000 Furse 44-526. However, absent such an agreement, he is without authority to modify the Award. Additionally, the request presented by claimant is not one which would properly be the subject of an Order Nunc Pro Tunc.

The purpose of an Order Nunc Pro Tunc is to provide a means for entering the actual judgment of the trial court which for one reason or another was not properly recorded.[22] It may not be used to correct a judicial error involving the merits, to enlarge the judgment originally rendered, to supply a judicial omission or to show what the court should have decided, as distinguished from what it actually did decide.[23] The ALJ did not have the authority to enter an Order Nunc Pro Tunc in this matter to correct the omission of the additional compensation amount into the Award, once the Award was issued. Further, that issue cannot properly be considered on appeal to the Board, because the Board can only consider the record had and introduced before the ALJ.[24]

K.A.R. 51-3-8 states:

> **The parties shall be prepared at the first hearing to agree on the claimant's average weekly wage except when the weekly wage is to be made an issue in**

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[22] *Wallace v. Wallace*, 214 Kan. 344, 520 P.2d 1221 (1974).

[23] *Book v. Everitt Lumber Co., Inc.*, 218 Kan 121, 542 P.2d 669 (1975).

[24] K.S.A. 44-555c(a).

the case. (a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. The following stipulations shall be used by the parties in every case: (emphasis added)

QUESTIONS TO CLAIMANT
1. In what county is it claimed that claimant met with personal injury by accident? (If in a different county from that in which the hearing is held, then the parties shall stipulate that they consent to the conduct of the hearing in the county in which it is being held.)
2. Upon what date is it claimed that claimant met with personal injury by accident?
QUESTIONS TO RESPONDENT
3. Does respondent admit that claimant met with personal injury by accident on the date alleged?
4. Does respondent admit that claimant's alleged accidental injury ''arose out of and in the course'' of claimant's employment?
5. Does respondent admit notice?
6. Does respondent admit that the relationship of employer and employee existed?
7. Does respondent admit that the parties are covered by the Kansas workers compensation act?
8. Does respondent admit that claim was made?
9. Did the respondent have an insurance carrier on the date of the alleged accident? What is the name of the insurance company? Was the respondent self-insured?

QUESTIONS TO BOTH PARTIES
10. What was the average weekly wage?
11. Has any compensation been paid?
12. Has any medical or hospital treatment been furnished? Is claimant making claim for any future medical treatment or physical restoration?
13. Has claimant incurred any medical or hospital expense for which reimbursement is claimed?
14. What was the nature and extent of the disability suffered as a result of the alleged accident?
15. What medical and hospital expenses does the claimant have?
16. What are the additional dates of temporary total disability, if any are claimed?
17. Is there a need for the claimant to be referred for a vocational rehabilitation evaluation?
18. Is the workers compensation fund to be impleaded as an additional party?
19. What witnesses will each party have testify at hearing or by deposition in the trial of the case?
20. Have the parties agreed upon a functional impairment rating?
The same stipulations shall be used in occupational disease cases with the exception that questions regarding ''accidental injury'' shall be changed to discover facts concerning ''disability from occupational disease'' or ''disablement.''
(b) An informal pre-trial conference shall be held in each contested case before testimony is taken in a case. At these conferences the administrative law judge shall

> determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the **stipulations and issues shall be made a part of the record.**
> **(c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage.** Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.
> (d) All parties shall be given reasonable opportunity to be heard. The testimony taken at the hearing shall be reported and transcribed. That testimony, together with documentary evidence introduced, shall be filed with the division of workers compensation, where the evidence shall become a permanent record. Any award or order made by the administrative law judge shall be set forth in writing, with copies mailed to the parties.
> (e) Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance.
> (f) Subpoena forms shall be furnished by the director upon request. The party subpoenaing witnesses shall be responsible for the completion, service, and costs in connection with the subpoenas.

The informal pre-trial conference is mandated by regulation. The conference is to be held in every workers compensation matter, before any testimony is taken. Respondent is required to appear at that conference with payroll information and to answer any questions which may arise regarding the average weekly wage. Apparently, that was accomplished in this matter, as indicated in the notes of the ALJ from that conference. But the ALJ and the parties failed to include that stipulated information in the average weekly wage in the record at the regular hearing and in the Award. The Board finds that the ALJ erred in so doing. In the interest of justice, this matter is remanded to the ALJ with the instructions to consider all of the information brought by the parties to the pre-hearing settlement conference, including the additional compensation information provided and apparently agreed to by the parties. If there is a dispute as to that information, the ALJ may conduct such further proceedings as may be necessary to resolve the issue. The calculation of the average weekly wage is the only issue being remanded to the ALJ. The Board does not retain jurisdiction over that issue on further appeal.

K.S.A. 2009 Supp. 44-555c(a) states in part:

> (a) There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

A telephone conference was held by the parties on May 8, 2012, on the issue of claimant's request for an Order Nunc Pro Tunc regarding claimant's average weekly wage. The transcript, along with the attached exhibits were not considered by the Board as it includes information not considered by the ALJ prior to the issuance of the Award.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed in part, but reversed and remanded with regard to the calculation of the average weekly wage. Claimant has proven that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The denial of pre-judgment interest under K.S.A. 2000 Furse 44-512b is affirmed as is the denial of the payment of medical benefits directly to Kenneth Holub rather than to the medical providers. This matter is remanded to the ALJ for consideration of the calculation of the average weekly wage, as set out above. The transcript of the Telephone Conference held May 8, 2012, with attachments, was not considered by the Board.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 2, 2012, is affirmed in part, and reversed in part and remanded to the ALJ on the issue of the calculation of claimant's average weekly wage.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge